

## **SPECIAL CONTRIBUTION**

### **PREMATURITY: A ROADBLOCK TO FAIR AND EQUAL ACCESS TO THE WORKERS' COMPENSATION COURT**

#### **I. OVERVIEW**

This paper brings to light a dichotomous procedural anomaly in the Louisiana workers' compensation court. Both employers and employees file their workers' compensation claims pursuant to Louisiana Revised Statutes (La. R.S.) § 23:1314, which provides a mechanism for dismissal of claims deemed premature by the court.<sup>1</sup>

A plain reading of the statute shows that it was designed to prohibit employees who receive full benefits from bringing claims before the court. Such a system is undeniably fair to employees because as long as they receive their full benefits, the court need not adjudicate their claims. At the same time, however, such a system is deficient in that employers are unable to file a claim until they have stopped paying the full benefits to which an employee asserts he is entitled. By forcing an employer to deny the payment of benefits before it can bring a workers' compensation claim, an employer must accept the possibility of statutory penalties before gaining access to the court's remedial power.

To fully illustrate this inherent procedural defect, this paper first examines the history of the Louisiana Workers' Compensation Act (LWCA) and some of the changes to the act since its inception. Next, the paper discusses the application of the prematurity statute within § 23:1314 to claims by employees and employers. The prematurity statute states that any claim failing to meet one of the statute's four criteria should be

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1. LA. REV. STAT. ANN. § 23:1314 (1998). This statute and all other statutes discussed throughout this paper are part of the Louisiana Workers' Compensation Act (LWCA). *Id.* For the purposes of this paper, the term employer(s) means both employer(s) and workers' compensation insurer(s). The problems affecting each are the same. Moreover, claims brought by employers are usually brought by the workers' compensation insurer. See LA. REV. STAT. ANN. §§ 23:1161-1168.1 (2005) for the laws regarding workers' compensation insurance coverage and contracts. Unless an employer is self-insured, almost all litigation is between the plaintiff and an attorney paid for by the insurer, who represents both the insurer and employer.

dismissed as premature;<sup>2</sup> therefore, this paper considers what employers must do to meet one of the four requirements of § 23:1314, and the consequences faced by employers in doing so. Some circuits apply the prematurity statute to summary proceeding statutes found within the LWCA.<sup>3</sup> These summary proceeding statutes provide parties with access to the workers' compensation court under specific circumstances while bypassing certain court procedures.<sup>4</sup> Specifically, summary proceeding statutes often allow for expedited hearings before the workers' compensation court because of the urgent nature of such claims.<sup>5</sup> This paper then examines whether courts recognize or ignore the pleading requirements found in summary proceeding statutes and whether the courts' application of § 23:1314 to summary proceeding claims is in direct conflict with legislative intent.<sup>6</sup> Lastly, this paper briefly considers the constitutional implications, and the mechanics of raising a claim in state court challenging the constitutionality of a Louisiana Workers' Compensation statute.

## II. HISTORY OF THE LOUISIANA WORKERS' COMPENSATION ACT

To fully illuminate the scope of the problem, it is useful to first consider the historical development of the LWCA, as well as the substantive and procedural changes that occurred during the Act's evolution. This discussion is important to understand the authority of the workers' compensation court to hear claims regarding the constitutionality of Louisiana workers' compensation statutes.

### A. THE ENACTMENT OF THE LOUISIANA WORKERS' COMPENSATION LAWS

In 1912, a review panel was commissioned to address the shortcomings in tort law with regard to industrial accidents.<sup>7</sup> The commission finished its initial report and submitted its recommendations to

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2. See *infra* note 57, where § 23:1314 is stated in its relevant parts.

3. See *infra* section V(B) for a full examination of the circuits' application of the prematurity statute to § 23:1124.

4. See *infra* note 108.

5. See *infra* notes 101, 107.

6. See *infra* section VII.

7. 13 H. ALSTON JOHNSON III, LOUISIANA CIVIL LAW TREATISE § 36 (4th ed. 2002). The problem for employers in tort law was that employees could prove a prima facie case simply by showing they were injured during the course of their employment. *Id.* § 37(3). Meanwhile, the drawbacks suffered by employees were the defenses available in tort law, which could either reduce or eliminate employer liability altogether. *Id.*

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the legislature in 1914.<sup>8</sup> The Louisiana Legislature adopted the recommendations almost verbatim as Louisiana Act No. 20 of 1914.<sup>9</sup> This conservative set of laws remained in effect until the next reform of the workers' compensation laws in 1975.<sup>10</sup> The initial act was named the Burke-Roberts Employers' Liability Act (the Burke-Roberts Act).<sup>11</sup> As part of this Act, employers received tort immunity in exchange for strict liability relating to workplace injuries for those professions deemed hazardous by the Louisiana Legislature and courts.<sup>12</sup> The Burke-Roberts Act is the predecessor to the modern LWCA.<sup>13</sup>

**B. DEFICIENCIES IN THE BURKE-ROBERTS ACT**

While the Burke-Roberts Act catalyzed the development of the modern workers' compensation system in Louisiana, it suffered from numerous procedural and substantive deficiencies. For example, coverage was elective rather than compulsory<sup>14</sup> and only those jobs deemed

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8. JOHNSON III, *supra* note 7, § 36.

9. *Id.*

10. *Id.* The author describes the Burke-Roberts Act as being conservative because it applied only to a limited number of employers; thus it applied only to a limited number of employees. 1914 La. Acts 44-45 (providing that workers' compensation coverage only applied to employees engaged in professions deemed hazardous under the Burke-Roberts Act). Under the current Act, on the other hand, coverage applies to all employers unless otherwise exempt by law. See LA. REV. STAT. ANN. § 23:1031 (2010). Furthermore, coverage under the Burke-Roberts Act was voluntary rather than mandatory. See JOHNSON III, *supra* note 7, § 37 (recognizing that coverage under the Burke-Roberts Act was voluntary for private employers); see also LA. REV. STAT. ANN. § 23:1031 (2010) (making coverage mandatory under the Louisiana Workers' Compensation Act). Taken together, these limited coverage factors tend to indicate that the Burke-Roberts Act was more conservative in nature.

11. See generally JOHNSON III, *supra* note 7, § 36. The Burke-Roberts Employers' Liability Act was named after Senator Walter J. Burke and Representative Robert Roberts who were members of the commission appointed by Governor Hall in 1912. See *id.*

12. See generally JOHNSON III, *supra* note 7, § 32. Johnson glossed over the application of tort immunity for employers and the acceptance of strict liability for medical and wages when stating:

Compensation, when regarded from the viewpoint of employer and employee, represents a compromise in which each party surrenders certain advantages in order to gain others which are of more importance both to him and to society. The employer gives up the immunity he otherwise would enjoy in cases where he is not at fault, and the employee surrenders his former right to full damages and accepts instead a more modest claim for bare essentials, represented by compensation.

*Id.*

13. See generally 1914 La. Acts 44-62. The 1914 Act created the Burke-Roberts Employer's Liability Act. See *id.*; see also, 1983 La. Acts 1821-56. By the time the Louisiana Legislature passed the 1983 Act, the workers' compensation act was named the Louisiana Workers' Compensation Act.

14. JOHNSON III, *supra* note 7, § 37. Johnson elaborated, "The employer had the option of either accepting or rejecting the Act, but in case he rejected the Act, he lost the benefit of the common law defenses discussed in the preceding chapter." *Id.* § 37(3) (citing LA. REV. STAT.

hazardous were within the statute's scope.<sup>15</sup> There was no requirement of security for payment of compensation<sup>16</sup> and only limited coverage was available for occupational diseases.<sup>17</sup> Moreover, all cases brought under the Burke-Roberts Act were handled in the district court.<sup>18</sup>

From 1914 to 1975, the workers' compensation system established by the Burke-Roberts Act evolved slowly from a system covering only select hazardous occupations to one offering nearly universal coverage to both employers and employees.<sup>19</sup> This evolution was a direct consequence of the jurisprudence, as courts dramatically expanded the characterization of hazardous occupations to include most occupational scenarios.<sup>20</sup> As a result of this broadened definition, the district courts eventually strained to effectively handle workers' compensation claims.<sup>21</sup>

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ANN. § 23:1042 (repealed 1975)).

15. JOHNSON III, *supra* note 7, § 37. See LA. REV. STAT. ANN. § 23:1035 (2010), wherein the legislative history provides 1914 La. Acts 44-45, which created a list of over 100 professions that were deemed hazardous by the legislature. 1914 La. Acts 46 further provided that "[i]f there be or arise any hazardous trade, business or occupation or work other than those hereinabove enumerated, it shall come under the provisions of this Chapter[.]" which served as a catch all provision by which any profession not named by the legislature could be deemed hazardous by the courts. 1914 La. Acts 46.

16. See JOHNSON III, *supra* note 7, § 37. A security deposit is obtained through a security agreement between the employer and the Office of Workers' Compensation (OWC). See Security Agreement For Certificate of Deposit (2008), available at <http://www.laworks.net/Downloads/OWC/certificateofdeposit.pdf>. According to sections 4 and 5 of the agreement, the employer grants to the OWC a security interest in property to secure the prompt payment of benefits. See *id.* Section 6 of the agreement requires the employers to list the value of the collateral (certificate of deposit) and any relevant account information for where the security interest will be held. *Id.* The significance of this agreement is that it requires the employer to provide financial security for claims in litigation so that if the employer or insurer were unable to pay the claim, the court may secure payment through the deposit or collateral.

17. JOHNSON III, *supra* note 7, § 37. The Burke-Roberts Act provided no reference as to injuries resulting from occupational diseases; therefore, occupational diseases were not recognized as compensable injuries until later.

18. 14 H. ALSTON JOHNSON III, LOUISIANA CIVIL LAW TREATISE § 385 (4th ed. 2002) (noting that for the first seventy years claims were brought before the district court).

19. See *supra* note 15 and accompanying text. 1914 La. Acts 46 contained the catch-all provision giving courts the authority to determine which occupations should be deemed hazardous on a case-by-case basis. 1914 La. Acts 46. This paper refers to universal coverage to mean coverage under the workers' compensation laws not limited in its application to employers and employees engaged only in hazardous work. Instead, universal coverage applies to all employers without regard to the type of occupation in which they are engaged.

20. See Johnson III, *supra* note 7, § 93. The likely reason that courts deemed most occupations hazardous was because of the limited coverage provided under the 1914 Act. By deeming an occupation hazardous, the court was able to create a system that included and provided protections to more employers and employees.

21. See generally 1975 La. Acts 1226-36; JOHNSON III, *supra* note 7, § 93. The expanded definition of hazardous conditions and the later amendments to the Burke-Roberts Act likely resulted in a dramatic increase of the number of cases going before the district courts.

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In 1975, the Louisiana Legislature passed Louisiana Act 583 of 1975, which laid the foundation for a more liberal compensation system by focusing on prompt and effective delivery of benefits and services.<sup>22</sup> Some of the changes afforded by the 1975 amendments were: (1) the elimination of the 500 week limitation on the maximum disability or death benefits allowed for compensation claims,<sup>23</sup> (2) the requirement of a security deposit by employers,<sup>24</sup> (3) the mandatory participation of employers,<sup>25</sup> (4) the expansion of the Burke-Roberts Act to include almost all jobs without regard to whether the employee was engaged in hazardous activity at the time of injury,<sup>26</sup> and (5) the inclusion of some occupational diseases within the statute's ambit.<sup>27</sup> These changes indicated the Legislature's recognition

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22. See generally 1975 La. Acts 1226-36.

23. See generally LA. REV. STAT. ANN. § 23:1035 (as amended by 1975 La. Acts 1229). Under the pre-1975 law, employees were limited to receiving a maximum 500 weeks of disability or death benefits. Although some benefits, such as supplemental earnings benefits, are now limited to ten years, other benefits, such as permanent total disability, are provided for life and for settlement purposes are calculated using an actuary table that predicts the employee's life expectancy.

24. See generally 1975 La. Acts 1226-36; see also *supra* note 16 for a full discussion of security deposits.

25. See generally LA. REV. STAT. ANN. § 23:1035 (as amended by 1975 La. Acts 1229); LA. REV. STAT. ANN. § 23:1031 (2010). This statute states that "[i]f an employee not otherwise eliminated from the benefits of this Chapter receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereinafter designated." LA. REV. STAT. ANN. § 23:1031 (2010)(A). By applying to all employees not otherwise excluded, this statute makes coverage mandatory.

26. See generally LA. REV. STAT. ANN. § 23:1035 (as amended by 1975 La. Acts 1229); see generally JOHNSON III, *supra* note 7, § 93. The first case expanding coverage to those injured while not engaged in hazardous activity was *Byas v. Hotel Bentley*. *Byas v. Hotel Bentley*, 103 So. 303 (La. 1924), *superseded by* LA. REV. STAT. ANN. § 23:1031 (1989). In *Byas*, the Louisiana Supreme Court held that if an employee's duties involved both hazardous and non-hazardous activity then he would be covered by the Act. *Id.* at 304. This was known as the *Byas* Doctrine. JOHNSON III, *supra* note 7, § 93. This coverage was expanded where there was a "somewhat perfunctory finding that the claimant had been 'regularly and frequently' exposed to hazardous features in the business so that the *Byas* Doctrine would apply." *Id.* at n.11; see, e.g., *Fontenot v. J. Weingarten, Inc.*, 249 So. 2d 886 (La. 1971); *Bolton v. Great Atl. & Pac. Tea Co.*, 245 So. 2d 452 (La. App. 3 Cir.1971); and *Pinchera v. Great Atl. & Pac. Tea Co.*, 206 So. 2d 793 (La. App. 2 Cir. 1968).

27. See generally 1975 La. Acts 1228-29. La.R.S. § 23:1301.1 governs coverage of occupational disease claims. LA. REV. STAT. ANN. § 23:1201.1 (2005). Section 1301.1(C) provides coverage for lab technicians who contract an occupational disease during the performance of their job. *Id.* at (C). Section 1301.1(D) provides a rebuttable presumption against coverage for all employees who contract an occupational disease when employed with an employer for less than twelve months. *Id.* at (D). This paper notes, in an effort to fully disclose the limits of occupational disease coverage, that § 1301.1(B) limits coverage for specific occupational diseases such as degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related and perivascular disease. See *id.* at (B). However, a full

of the need for a more thorough and expansive compensation system than that provided for by pre-1975 workers' compensation law. Furthermore, the 1975 amendments were the first set of amendments to the workers' compensation law since its inception in 1914 that fundamentally expanded its scope. The broader scope of these amendments likely resulted in an overall increase in the number of workers' compensation cases, pushing the district courts' ability to handle these cases to their limits; however, the 1975 amendments did not yet recognize the need for an administrative system.

### C. THE SHIFT FROM A JUDICIAL SYSTEM TO AN ADMINISTRATIVE SYSTEM

The inefficiency of the district courts in adjudicating workers' compensation claims was recognized as early as the 1975 amendments.<sup>28</sup> It was not until 1983, however, that the Louisiana legislature created the Office of Workers' Compensation (OWC).<sup>29</sup> The OWC was intended to function as an advisory system, whereby injured workers and employers were required to seek the advice of the Director of the OWC prior to filing a claim in the district court.<sup>30</sup> The hope was that this advisory agency would help to reduce some of the burden created by the sheer volume of workers' compensation claims in the district courts.<sup>31</sup> Ultimately, however, the Louisiana Legislature decided to create special courts to hear workers' compensation claims.<sup>32</sup> To provide the workers' compensation courts with the ability to hear claims that were otherwise under the jurisdiction of district courts,<sup>33</sup> the legislature had to pass an amendment to the Louisiana constitution.

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discussion of these topics is beyond the scope of this paper. For a more detailed discussion of each topic, see JOHNSON III, *supra* note 7, § 37(1).

28. See JOHNSON III, *supra* note 7, § 37(1).

29. See LA. REV. STAT. ANN. § 23:1291 (1998) (as amended by 1983 La. Acts 1841-42). This statute created the OWC.

30. See JOHNSON III, *supra* note 7, § 37(1). This statute provided that claims for compensation were to be submitted to the Director of the OWC for recommendation before proceeding to trial. LA. REV. STAT. ANN. § 23:1291 (1998) (as amended by 1983 La. Acts 1841-42).

31. See generally JOHNSON III, *supra* note 7, § 37(1) (recognizing that the function of the OWC was to advise litigants so that they may resolve claims without resorting to the district court, yet acknowledging that the recommendation was non-binding and the litigants maintained a right to proceed in the district court if they were not satisfied with the result reached by the OWC).

32. See generally JOHNSON III, *supra* note 18 (stating that district courts were replaced first by administrative hearing officers and then workers' compensation judges to adjudicate workers' compensation claims).

33. See *Albe v. La. Workers' Comp. Corp.*, 97-0014 (La. 10/21/97); 700 So. 2d 824. In *Albe*, the Louisiana Supreme Court recognized that the workers' compensation court did not have the authority to hear workers' compensation claims under the constitution because such power was

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In 1990, the OWC gained sole authority over workers' compensation cases.<sup>34</sup> The OWC's primary function was to promptly and effectively deliver workers' compensation benefits and services.<sup>35</sup> Thus, the move from a judicial system to an administrative system was intended to minimize the time required to adjudicate disputes arising under the workers' compensation laws.<sup>36</sup>

Additionally, resolving disputes in an administrative court system was less costly than channeling claims through the district courts.<sup>37</sup> Another rationale, and perhaps the most important reason behind the transition, was that an administrative system provides the flexibility needed to promote the settlement of cases through compromise.<sup>38</sup> Although many cases are settled on a lump sum basis, recent legislation amended the act to favor periodic benefit payments over lump sum payments.<sup>39</sup> This is important because it may show a shift in the court's preference for settlements in workers' compensation cases, which means that many employers will be less likely to settle if they have to make periodic payments rather than a lump sum settlement. Periodic benefit payments require continued judicial oversight,

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vested solely in the district courts. *Albe v. La. Workers' Comp. Corp.*, 97-0014 (La. 10/21/97); 700 So. 2d 824, 829. The court however acknowledged that the legislature ratified amendments to article V, section 16(A) of the Louisiana Constitution, divesting the district court of its jurisdiction over workers' compensation claims. *Id.* In other words, the workers' compensation courts have jurisdiction to hear substantive issues under the Workers' Compensation Act, but they do not have the power to hear constitutional issues. *Id.* The amendment became active November 8, 1990. The amendment further gave appellate review authority to the courts of appeal. *See* LA. CONST. ART. V, 16(A) (as amended by 1990 La. Acts 2876-77).

34. *See* 1988 La. Acts 2453-83. This act was made effective January 1, 1990. *Id.* This Act allowed the Office of Workers' Compensation to create its own court system and to adjudicate workers' compensation claims. *See id.* Moreover, litigants were required to adjudicate their claims through the Office of Workers' Compensation instead of the district courts. *Id.*

35. The five major objectives of any modern workers' compensation program are broad coverage of employees and of work-related injuries and diseases, substantial protection against interruption of income, the provision of sufficient medical care and rehabilitation services, encouragement of safety, and, a prompt and effective system for delivery benefits and services. THE NAT'L COMM'N OF STATE WORKMEN'S COMPENSATION LAWS, REPORT 15 (1972).

36. *See* JOHNSON III, *supra* note 7, § 37(1). *See supra* note 21 for an explanation of why the district courts would suffer delays when adjudicating workers' compensation claims.

37. *See* JOHNSON III, *supra* note 7, § 37(1). The increased cost of a district court system directly correlates to the administrative court's ability to promote settlement through mediations and conferences not regularly available through the district court itself. By promoting early settlements, the administrative court can often lower the attorney fees in workers' compensation cases, which tend to be considerable even when limitations are placed on the total amount of attorney fees recoverable.

38. *See id.*

39. *See id.*; *see also* LA. REV. STAT. ANN. § 23:1271 (as amended by 1983 La. Acts 1839-40). The 1983 amendments provided that it is stated policy that benefit payments on a periodic basis are in the best interest to injured workers. *See* § 23:1271.

which further demonstrates that an administrative court system is a more effective means of resolving workers' compensation claims.

A final reason behind the shift was that district court judges often possessed inadequate knowledge concerning both matters of medicine and industry, rendering them less capable of dealing with workers' compensation claims in an informed and expeditious manner.<sup>40</sup>

#### **D. WHERE DOES THE LOUISIANA WORKERS' COMPENSATION ACT STAND TODAY?**

Today, the Louisiana Workers' Compensation Act (LWCA) covers nearly all occupations.<sup>41</sup> Louisiana, unlike other states, does not possess a minimum employee provision for coverage.<sup>42</sup> Since the initial incarnation of Louisiana's workers' compensation laws in 1914, coverage has expanded tremendously, and the state legislature has repeatedly recognized the need for employers to be granted certain protections and investigation tools under the Act.

Specifically, La. R.S. § 1310.3 gives employers the right to file claims in the workers' compensation court to controvert an employee's claim of entitlement to benefits.<sup>43</sup> More specific statutes have subsequently been passed under the summary proceeding statutes. These statutes provide employers with an array of measures to use when disputing employees' claims. These measures include requesting that an employee be seen by the employer's choice of medical practitioner,<sup>44</sup> requesting that the employee be seen by an independent medical examiner (IME) appointed by the

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40. See JOHNSON III, *supra* note 7, at § 37(1). The inadequacy of district court judges is compared to that of a commission of specialists who practice only in that area.

41. See 1975 La. Acts 1229 (setting forth the amendments to title 23, section 1035 of the Louisiana Revised Statutes). This act revoked the hazardous business requirement, expanded coverage to nearly all professions, and made coverage compulsory through the amendment of § 23:1035. See 1975 La. Acts 1229.

42. Minimum employee coverage is a concept often used in employment law. This means that under a particular law an employer must have a specific number of employees to be governed by that law. The LWCA does not incorporate minimum employee coverage into the Act. There are numerous other states with minimum employee thresholds before employers become subject to the workers' compensation laws for that state. For example, Alabama requires mandatory coverage for employers with more than four part-time or full-time employees, and Virginia requires mandatory coverage for employers with three or more part-time or full-time employees. ALA. CODE § 25-5-50 (2008 & Supp. 2010); VA. CODE ANN. § 65.2-101 (2010).

43. LA. REV. STAT. ANN. § 23:1310.3 (1998) (as amended by 2010 La. Sess. Law Serv. No. 53).

44. LA. REV. STAT. ANN. § 23:1121(A) (2005) (providing authority for the employer to have an employee examined by a medical practitioner of his choice). This practice is most commonly referred to as a second medical opinion (SMO).

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OWC,<sup>45</sup> compelling the employee to undergo a functional capacity evaluation,<sup>46</sup> compelling the previously mentioned medical examinations,<sup>47</sup> and requesting a determination of social security benefits to assess offsets.<sup>48</sup> Each of these statutes was created to better enable the employer and the court to evaluate an employee's claim of entitlement to benefits and to deliver those benefits to the employee in a prompt and effective manner.

### III. FILING CLAIMS IN THE WORKERS' COMPENSATION COURT AND LA. R.S. § 23:1314

Louisiana workers' compensation law allows for either the employee or the employer to file a claim with the OWC to resolve a dispute between the parties.<sup>49</sup> Section 23:1310.3 provides that "[i]f . . . a bona fide dispute occurs, the employee or his dependent or the employer or insurer may file a claim . . . on a form to be provided by the director."<sup>50</sup> Moreover, § 23:1310.3(A) provides that "[a] claim for benefits, the controversion of entitlement to benefits, or other relief under the Workers' Compensation Act shall be initiated by the filing of the appropriate form with the Office of Workers' Compensation Administration."<sup>51</sup> The appropriate form under § 23:1310.3 is form LWC-WC 1008 (Form 1008).<sup>52</sup> Although § 23:1310.3

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45. LA. REV. STAT. ANN. § 23:1124.1 (2004) (providing a judge ordered IME); LA. REV. STAT. ANN. § 23:1123 (2005), as amended by 2010 La. Sess. La. Serv. No. 3 (providing a director's IME); LA. ADMIN. CODE tit. 40, § 2715(C) (2010) (providing a utilization review IME).

46. LA. REV. STAT. ANN. § 23:1121(A) (2005); *Gautreaux v. KAS Constr.*, 05-1192 (La. App. 3 Cir. 02/22/06); 923 So. 2d 850, 851-52.

47. LA. REV. STAT. ANN. § 23:1124 (2005); see *supra* notes 44-46 for the types of medical evaluations subject to compulsion pursuant to section 23:1124.

48. LA. REV. STAT. ANN. § 23:1225 (1998), *invalidated by Wal-Mart Stores, Inc. v. Keel*, 2001-3013 (La. 4/3/02); 817 So. 2d 1.

49. See LA. REV. STAT. ANN. § 23:1310(A) (1998). This statute provides:

If, at any time after notification to the office of the occurrence of death or injury resulting in excess of seven days lost time, a bona fide dispute occurs, the employee or his dependent or the employer or insurer may file a claim with the state office, or the district office where the hearing will be held, on a form to be provided by the director.

*Id.*; see also *La. Commerce & Trade Ass'n-SIF v. Cruz*, 2009-2014, (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041.

50. LA. REV. STAT. ANN. § 23:1310(A) (1998).

51. LA. REV. STAT. ANN. § 23:1310.3 (1998) (as amended by 2010 La. Sess. Law Serv. No. 53).

52. See LWC-WC-1008, available at <http://www.laworks.net/Downloads/OWC/1008form.pdf>. Form 1008, also referred to by its title "Disputed Claim for Compensation", is the default document used by both employers and employees when filing workers' compensation claims, provided no other form is specified by statute. See LA. REV. STAT. ANN. § 23:1310.3 (1998) (as amended by 2010 La. Sess. Law Serv. No. 53); see LWC-WC-1008. The filing of a Form 1008 is a mandatory pleading requirement in cases arising under § 23:1310.3. See LA. REV. STAT. ANN. § 23:1310.3 (1998) (as amended by 2010 La. Sess. Law Serv. No. 53). The Form 1008 requires the employee and employer's identifying information, the date of injury, physical location where the injury occurred, and the nature of the injury itself. See LWC-WC-1008.

is a component of the LWCA, it is considered an ordinary proceeding statute under the Louisiana Rules of Civil Procedure.<sup>53</sup>

The clear language of § 23:1310.3 allows for employees to file claims for benefits and for employers to controvert payment of benefits. The pleading requirements for filing such claims are outlined in § 23:1314, which acts as both the source of the prematurity exception and a defense to a cause of action.<sup>54</sup> In Louisiana, an exception “is a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him.”<sup>55</sup> A prematurity exception when alleged and upheld serves as a defense whereby the court dismisses a claim as premature. A finding of “prematurity” means that while an underlying claim may exist, the circumstances required to bring the claim before the court do not. Pursuant to § 23:1314, a claim for compensation or the controversion of benefits is premature unless one of the four pleading requirements is alleged by the filing party.<sup>56</sup>

Under § 23:1314, a claim brought under § 23:1310.3 is deemed premature unless it is alleged that: (1) the employee is not being paid the full amount to which he is entitled; (2) proper medical treatment has not been provided; (3) the employee refuses to furnish medical records; or (4) the employer has not paid penalties and attorney fees due to the employee.<sup>57</sup>

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53. See LA. CODE CIV. PROC. ANN. arts. 851-2080 (2010). Classification as an ordinary proceeding makes any claim filed pursuant to that statute subject to regular proceeding requirements related to filing a claim with the workers' compensation court (e.g., mediation, lack of access to expedited proceedings, and a longer time frame for the claim to proceed through the court).

54. See LA. REV. STAT. ANN. § 23:1314 (1998).

55. LA. CODE CIV. PROC. ANN. art. 921 (2010).

56. See LA. REV. STAT. ANN. § 23:1314 (1998).

57. See *id.* Section 23:1314 states, in pertinent part:

A. The presentation and filing of the petition under R.S. 23:1310.3 shall be premature unless it is alleged in the petition that:

- (1) The employee or dependent is not being or has not been paid, and the employer has refused to pay, the maximum percentage of wages to which the petitioner is entitled under this Chapter; or
- (2) The employee has not been furnished the proper medical attention, or the employer or insurer has not paid for medical attention furnished; or
- (3) The employee has not been furnished copies of the reports of examination made by the employer's medical practitioners after written request therefor has been made under this Chapter; or
- (4) The employer or insurer has not paid penalties or attorney's fees to which the employee or his dependent is entitled.

B. The petition shall be dismissed when the allegations in Subsection (A) of this Section are denied by the employer and are shown at a time fixed by the workers' compensation judge to be without reasonable cause or foundation in fact.

LA. REV. STAT. ANN. § 23:1314 (1998).

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With each of these in mind, it is important to examine what is required of an employer to bring a claim in the workers' compensation court, which is often at odds with the underlying goal of providing prompt and immediate payment of benefits to employees.<sup>58</sup>

Louisiana law ensures prompt payment by mandating that employers commence payment of indemnity benefits within fourteen days of learning of the employee's injury.<sup>59</sup> Employers who fail to abide by this timeline become subject to penalties and attorney fees.<sup>60</sup> Furthermore, once an employer begins payment of benefits to an employee, his duty to continue payments is enforced by a provision implemented to penalize the improper termination of benefits.<sup>61</sup> An employer is not left without a means to challenge an employee's claim, though.

An employer may bring a claim under § 23:1310.3 to determine the status, condition, ability to return to work, and other issues that would more accurately determine an employee's actual entitlement to benefits. However, pursuant to the statute, an employer may not bring such a claim until they acknowledge a failure to meet one of the four duties found in the pleading requirements of § 23:1314.<sup>62</sup> Yet failing to fulfill one of those duties also renders the employer subject to penalties and attorneys' fees under § 23:1201(I), which provides:

Any employer or insurer who at any time discontinues payment of claims due and arising under this Chapter, when such discontinuance is found to be arbitrary, capricious, or without probable cause, shall be subject to the payment of a penalty not to exceed eight thousand dollars and a reasonable attorney fee for the prosecution and collection of such claims.<sup>63</sup>

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58. LA. REV. STAT. ANN. § 23:1314 (1998). Section 23:1314(A)(1) applies when the employee or dependent is not being paid indemnity; § 23:1314(A)(2) applies when the employee is not receiving proper medical attention; § 23:1314(A)(3) applies when the employee is not provided copies of medical reports from the employer's medical provider; and, § 23:1314(A)(4) applies when an employee or dependent has not received penalties or attorney fees to which they are entitled. *Id.* Indemnity refers to the benefits that, within the limits of the law, indemnify an employee for the income he has lost as a result of a work related injury. See *supra* note 35 for a statement of the five goals of a modern LWCA.

59. LA. REV. STAT. ANN. § 23:1201(B) (2005) (providing that benefits become due 14 days after an employer obtains knowledge of an injury leading to temporary total disability, permanent partial disability, or death); § 23:1201(C) (providing that benefits become due 14 days after an employer obtains knowledge of an injury leading to an employee claiming supplemental earnings benefits)

60. LA. REV. STAT. ANN. § 23:1201(F) (2005).

61. LA. REV. STAT. ANN. § 23:1201 (1998) (as amended by 2010 La. Sess. Law Serv. No. 3).

62. See LA. REV. STAT. ANN. § 23:1314 (1998); see also *supra* note 57.

63. LA. REV. STAT. ANN. § 23:1201(I) (2005). The Louisiana Supreme Court declared in 2005

Thus, an employer who starts paying benefits, thereby acting prudently and in the employee's best interest, is enigmatically deprived of the ability to investigate the veracity of an employee's claim without first incurring penalties. This dilemma essentially forces an employer to roll the dice and hope that a judge will find a decision to terminate payments was not arbitrary, capricious, or without good cause.<sup>64</sup>

#### IV. AN EXAMINATION OF THE JURISPRUDENCE REGARDING LOUISIANA LA. R.S. § 23:1314 AS APPLIED TO EMPLOYEES

Numerous challenges have been levied against § 23:1314 as violating the Louisiana constitution. However, most were not brought by employers. Instead, they were advanced by employees who were already receiving the maximum amount allowable under workers' compensation law.<sup>65</sup> In those cases, employees filed claims with the OWC, which were subsequently dismissed on the basis of prematurity.<sup>66</sup> Dismissal on such grounds is precisely the purpose for which § 23:1314 was passed.<sup>67</sup> More specifically, § 23:1314 seeks to prevent employees from cluttering the courts with frivolous lawsuits after they have received all to which they are entitled.<sup>68</sup>

The law is consistent with regard to when an exception of prematurity is upheld against an employee. An employee's claim is dismissed as premature when the employee is already receiving all benefits to which he is entitled under the LWCA.<sup>69</sup> Prematurity as it applies to employers, however, is far less certain.

Just as the law protects employees by ensuring they have a place to

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that "[t]he crucial issue for determining whether an employer's actions are arbitrary and capricious is whether the employer can articulate an objective reason for discontinuing benefits at the time it took the action." *Frith v. Riverwood, Inc.*, 2004-1086 (La. 1/19/05); 892 So. 2d 7, 15 (citing *Williams v. Rush Masonry, Inc.*, 98-2271 (La. 6/29/99); 737 So. 2d 41, 46).

64. See LA. REV. STAT. ANN. § 23:1201(I) (2005).

65. See *Moore v. Am. Motorist Ins. Co.*, 216 So. 2d 674, 675 (La. App. 3 Cir. 1968); see also *Bellard v. S. La. Contractors, Inc.*, 513 So. 2d 830, 831 (La. App. 3 Cir. 1987); *Dupre v. Travelers Ins. Co.*, 477 So. 2d 1279, 1281 (La. App. 3 Cir. 1985).

66. See *Bellard*, 513 So. 2d at 832; *Dupre*, 477 So. 2d at 1282. *Moore* was decided prior to the creation of the OWC; however, the employee in that case filed a claim with the district court, which was dismissed as premature because he was receiving all benefits to which he was entitled. *Moore*, 216 So. 2d at 676.

67. See *D'Antoni v. Employers' Liability Assurance Grp.*, 34 So. 2d 378, 380 (La. 1948) (holding that the purpose of the prematurity statute was to provide for the dismissal of complaints seeking compensation when the employee fails to allege an allegation of non-payment).

68. See *D'Antoni v. Employers' Liability Assurance Grp.*, 34 So. 2d 378, 380 (La. 1948) (recognizing that when no compensation is due on claims seeking compensation, the court should dismiss).

69. See *Moore v. Am. Motorist Ins. Co.*, 216 So. 2d 674, 676 (La. App. 3 Cir. 1968); see also *Bellard v. S. La. Contractors, Inc.*, 513 So. 2d 830, 831-32 (La. App. 3 Cir. 1987).

adjudicate claims of underpayment, the law should also provide a way for employers to adjudicate claims regarding overpayment. Therefore, the next section will focus on the rulings of the courts asked to determine the applicability of § 23:1314 to employers.

## **V. AN EXAMINATION OF THE JURISPRUDENCE REGARDING LOUISIANA LA. R.S. § 23:1314 AS APPLIED TO EMPLOYERS**

The Louisiana First, Fourth, and Fifth Circuits all acknowledge the procedural inconsistency resulting from a uniform application of § 23:1314 to employers and employees, yet all expressed an obligation to obey the plain wording of the statute.<sup>70</sup> This paper will consider cases from these circuits as they relate to the ordinary proceeding and summary proceeding statutes because each clearly illustrates the inconsistencies that arise under § 23:1314 when employers are held to the letter of the law. Furthermore, this paper will consider the relationship of § 23:1310.3, an ordinary proceeding statute, with the summary proceeding statutes of the LWCA.

### **A. COURTS APPLYING LA. R.S. § 23:1314 TO LA. R.S. § 23:1310.3**

Section 23:1310.3 permits employees and employers to file claims through ordinary proceedings.<sup>71</sup> It is a general statute providing both employees and employers with equal access to the Louisiana workers' compensation court for the adjudication of workers' compensation claims.<sup>72</sup>

#### **1. THE FOURTH CIRCUIT COURT OF APPEAL**

In *Bank One v. Johnson*, the employer filed a claim seeking declaratory judgment to controvert the continued payment of benefits to an injured employee.<sup>73</sup> Johnson, the employee, filed a prematurity exception to the claim, arguing that Bank One failed to meet the pleading requirements set forth in § 23:1314.<sup>74</sup>

In response to the prematurity exception defense, Bank One asserted that § 23:1314 does not permit employers to initiate workers' compensation claims.<sup>75</sup> In so doing, Bank One equated the pleading requirements set

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70. See *infra* section V(A).

71. For a more detailed discussion of Louisiana procedural requirements on ordinary proceeding lawsuits, see 1 FRANK L. MARAIST, LOUISIANA CIVIL LAW TREATISE §§ 5-10 (2d ed. 2008).

72. The basic requirements refers to those pleading requirements found in § 23:1314, but more importantly it refers to a concept which allows claims to be brought forth by an employee to obtain benefits and an employer who seeks to controvert benefits as noted in § 23:1310.3.

73. *Bank One v. Johnson*, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 31.

74. *Id.*

75. *Id.*

forth in § 23:1314 with a complete inability to file any claims in the workers' compensation court.<sup>76</sup>

In addressing Bank One's averment, the fourth circuit held that employers do possess a right to file claims in the workers' compensation court under the LWCA.<sup>77</sup> In considering the applicability of prematurity to Bank One's claim, the court cited prior fourth circuit jurisprudence holding that although employers may file claims in workers' compensation court, they must meet the requirements set forth in § 23:1314, otherwise the case may be dismissed as premature.<sup>78</sup> The court therefore dismissed Bank One's claim as premature because Johnson was still receiving the maximum benefits to which she was entitled under the law.<sup>79</sup>

Bank One correctly argued "that the only way an employer can make one of the allegations required by La. R.S. 23:1314 is if it fails to meet its obligations under the workers' compensation laws."<sup>80</sup> Thus, the application of § 23:1314 to an employer's claim filed under § 23:1310.3 created an "absurd consequence."<sup>81</sup> Though the court recognized the anomaly created by the current versions of §§ 23:1310.3 and 23:1314 as they apply to employers, it found that the matter was one for the legislature to correct.<sup>82</sup>

## 2. THE FIRST CIRCUIT COURT OF APPEAL

*Louisiana Commerce & Trade Association-SIF v. Cruz* is the most recent case to address the repercussions of requiring employers to meet the

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76. Bank One v. Johnson, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 31. As support, Bank One cited *Snelling Personnel Services v. Duhon*, in which the court permitted an employer to discontinue payment of benefits after filing a claim to contest benefits. *Id.* (citing *Snelling Pers. Svcs. v. Duhon*, 00-661 (La. App. 3 Cir. 11/2/00); 772 So. 2d 350, 354).

77. Bank One v. Johnson, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 31-32.

78. *Id.* at 32 (citing *Michaels Store v. Hart*, 2001-0655 (La. App. 4 Cir. 3/20/02); 815 So. 2d 201).

79. Bank One v. Johnson, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 33.

80. *Id.* at 32.

81. *Id.*

82. *Id.* Judge Armstrong's concurrence emphasizes the peculiar situation the court faced regarding § 23:1314. In it, he stated:

While I agree with the result reached by the majority, I write separately to note that Bank One makes a valid argument that employers should have the prerogative to file a LDOL-WC-1008 form in cases where an employee is receiving benefits to which he or she may not be entitled. However, as we noted in [*Michaels Store, Inc. v. Hart*], that is something that must be dealt with by the legislature's amending the Workers' Compensation statute or by the Supreme Court's holding that La. R.S. 23:1314 does not apply to LDOL-WC-1008 forms filed by employers.

Bank One v. Johnson, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 33 (Armstrong, J., concurring). Thus, while the court concluded that Bank One's concern about the absurd consequences produced by § 23:1314 when applied to employers was valid, it felt constrained by prior precedent to conclude that § 23:1314 applies to employers.

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pleading requirements outlined in the § 23:1314.<sup>83</sup> In this case, the employer, Mardi Gras Productions (MGP), filed a claim against Cruz, a company employee, for the termination of supplemental earnings and other workers' compensation benefits.<sup>84</sup> Up to the time of filing, MGP had voluntarily paid all benefits due to Cruz.<sup>85</sup> In response to MGP's claim, Cruz filed an exception of prematurity.<sup>86</sup> The workers' compensation court upheld Cruz's exception and dismissed MGP's claim.<sup>87</sup> MGP subsequently filed an appeal.<sup>88</sup>

The court *sua sponte* raised the issue of whether § 23:1314 applies to employers.<sup>89</sup> The first circuit concluded that any determination as to the inconsistencies arising under § 23:1314 and its applicability to employers was not within the scope of the judicial branch.<sup>90</sup> In reaching its conclusion, the court relied on jurisprudence from the fourth<sup>91</sup> and fifth circuits,<sup>92</sup> in which those courts also found that a resolution of § 23:1314's deficiencies was a matter left to the state legislature.<sup>93</sup> After concluding that § 23:1314 applied to MGP, the first circuit then turned its attention to MGP's argument that it had met the pleading requirements of § 23:1314.<sup>94</sup>

MGP argued that the statutory pleading requirements of § 23:1314 were satisfied because MGP was paying more than the maximum to which

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83. La. Commerce & Trade Ass'n-SIF v. Cruz, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041.

84. *Id.* at 1042. La. Commerce & Trade Association-SIF was the workers' compensation insurer of Mardi Gras Productions, Inc., the employer in this case. *Id.*

85. *Id.*

86. *Id.* at 1043.

87. La. Commerce & Trade Ass'n-SIF v. Cruz, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1043.

88. *Id.*

89. *Id.* at 1045.

90. *Id.* at 1044 (commenting that "any inconsistency in these workers' compensation statutes as applied to employers is a matter for the legislature, not the courts, to correct.").

91. *Bank One v. Johnson*, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30; *Michaels Store v. Hart*, 2001-0655 (La. App. 4 Cir. 05/20/02); 815 So. 2d 201.

92. *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295, 297-98.

93. La. Commerce & Trade Ass'n-SIF v. Cruz, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1044; *see also Bank One*, 882 So. 2d at 32-33 (stating that although the Fourth Circuit recognized the anomaly created by the application of § 23:1314 to employers, it "is a matter for the Legislature to correct, and not the courts."); *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295, 297-98 (recognizing the anomaly created by applying § 23:1314 to employers but holding "that is something that must be dealt with by the legislature amending the Workers' Compensation statute or the Supreme Court holding that La. R.S. 23:1314 does not apply to LDOL-WC-1008 forms filed by employers.").

94. La. Commerce & Trade Ass'n-SIF v. Cruz, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1045.

Cruz was entitled.<sup>95</sup> MGP attempted to argue that because Cruz was paid an amount greater than the maximum to which he was entitled by law, he was not, in fact, being paid the maximum amount.<sup>96</sup> While recognizing the creativity of MGP's argument, the court found that paying more than is due should not be construed to mean not receiving the maximum.<sup>97</sup>

Thus, the first circuit found that employers seeking the termination or reduction of an employee's benefits are subject to the pleading requirements set forth in § 23:1314.<sup>98</sup> Consequentially, to satisfy these pleading requirements, employers are required to intentionally disregard their statutory obligations under the LWCA to gain access to the court.<sup>99</sup>

### B. APPLYING LA. R.S. § 23:1314 TO § 23:1124

To date, the courts have only applied § 23:1314 to one summary proceeding statute under the LWCA. That statute is La. R.S. § 23:1124, which provides employers with the authority to terminate benefits and to compel a medical examination if an employee refuses to attend such an examination.<sup>100</sup> As compared with § 23:1310.3, this statute is considered specific in nature. Section 23:1310.3 simply allows an employer to file a claim to dispute benefits. Section 23:1124, on the other hand, grants employers access to the court to compel a medical examination. It is for this reason that § 23:1124 and other statutes authorizing employers to use expedited hearings are classified as summary proceeding statutes.<sup>101</sup>

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95. La. Commerce & Trade Ass'n-SIF v. Cruz, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1045.

96. *Id.*

97. *Id.*

98. *See supra* note 57.

99. *See* LA. REV. STAT. ANN. § 23:1314 (1998).

100. LA. REV. STAT. ANN. § 23:1124 (2005).

101. The Louisiana Code of Civil Procedure article 2591 informs us that "[s]ummary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings." LA. CODE CIV. PROC. art. 2591 (2010). Louisiana Code of Civil Procedure article 2592 spells out the circumstances for which summary proceedings may be used. It states in part,

Summary proceedings may be used for trial or disposition of the following matters only:

- (1) An incidental question arising in the course of judicial proceedings, including the award of and the determination of reasonableness of attorney fees.
- (2) An application for a new trial.
- (3) An issue which may be raised properly by an exception, contradictory motion, or rule to show cause.

....

- (11) An action for dissolution or specific performance of a compromise entered pursuant to Article 1916(B) or by consent judgment.

LA. CODE CIV. PROC. ANN. art. 2592 (2010).

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For the purposes of this paper, it is important to note that the summary proceeding statutes provide access to the workers' compensation court under specific situations where the legislature has deemed access to be necessary.<sup>102</sup> In doing so, employers have access to expedited proceedings, which would otherwise not be available under § 23:1310.3.<sup>103</sup> However, summary proceeding claims often have their own pleading requirements.<sup>104</sup>

When processing an initial pleading, workers' compensation courts require the filing of a Form 1008<sup>105</sup> so that the details of the claim may be entered into the workers' compensation computer management system.<sup>106</sup> As a result, employers and employees seeking an expedited hearing must file a Form 1008 in addition to satisfying the general requirements of the Code of Civil Procedure with regard to summary proceedings.<sup>107</sup> However, under the LWCA there are numerous allowances for expedited hearings under the summary proceedings statutes.<sup>108</sup>

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102. *See, e.g.*, LA. REV. STAT. ANN. § 23:1124 (2005).

103. *See generally* LA. REV. STAT. ANN. § 23:1310.3 (1998) (as amended by 2010 La. Sess. Law Serv. No. 53). Section 23:1310.3 does *not* contain a provision allowing employees or employers access to expedited hearings for their claims. *Id.* Expedited hearings are only available when stated explicitly.

104. *See, e.g.*, LA. REV. STAT. ANN. § 23:1124 (2005). With this statute, an employer must plead the failure of an employee to partake in a medical examination as required by law; furthermore, the pleading requirement is stated explicitly within the statute. *See id.* A list of all statutes containing similar pleading requirements is too large to be provided in this paper.

105. *See supra* note 52.

106. Although a Form 1008 contains the information required to file a workers' compensation claim with the court, the minimum level of information required to file a claim is not located in any statute, on the form itself, or in the court's hearing rules. Instead the court is restricted by the information that it needs to enter the claim into their computer management system. Thus, a call to the court would be required to obtain the information necessary to file a claim.

107. Most issues heard before the workers' compensation court via an expedited hearing must be raised by filing a motion to compel or rule to show cause, which are governed by Louisiana Code of Civil Procedure article 2592(3). The pleading requirement for summary proceedings is found in Louisiana Code of Civil Procedure article 2593, which states that "[a] summary proceeding may be commenced by the filing of a contradictory motion or by a rule to show cause, except as otherwise provided by law." *See* LA. CODE CIV. PROC. ANN. art. 2593 (2010). The contradictory motion here is a motion for an expedited hearing.

108. *See generally* LA. REV. STAT. ANN. § 23:1124.1 (2005) (allowing for a judge ordered IME); LA. REV. STAT. ANN. § 23:1123 (2005) (as amended by 2010 La. Sess. Law Serv. No. 3) (allowing for a request for an IME through the Director of the OWC); LA. ADMIN. CODE tit. 40, § 2715(C) (2010) (allowing for the request of a utilization review IME); LA. REV. STAT. ANN. § 23:1121(A) (2005) (allowing an employer to request an employee be seen by the employer's choice of medical practitioner (SMO)); LA. REV. STAT. ANN. § 23:1124 (2005) (allowing an employer to compel medical examinations); LA. REV. STAT. ANN. § 23:1225 (1998) (requesting determination of social security benefits to assess offsets). Each of these statutes allows for expedited procedures or hearings. This list is not exhaustive and serves merely to illustrate the multitude of statutes possibly affected by a finding that the prematurity exception applies to summary proceedings.

To further complicate matters, § 23:1314 explicitly states that it applies only to those claims arising under § 23:1310.3, an ordinary proceeding statute. Yet the need to file a Form 1008 when seeking expedited review in the workers' compensation court has led at least two circuits to apply the prematurity exception in § 23:1314 to summary proceeding cases as well.<sup>109</sup> Thus, these decisions imply that in summary proceeding cases, a Form 1008 *must* be filed for the claim to be heard. While this is technically true because of the OWC's filing limitations,<sup>110</sup> the filing of a Form 1008 for summary proceeding claims is neither mandated by statute nor under the workers' compensation court hearing rules.<sup>111</sup>

### 1. THE FOURTH CIRCUIT IGNORES SUMMARY PROCEEDING RULES

In *Michaels Store, Inc. v. Hart*, the employer filed a Form 1008 pursuant to § 23:1124 to dispute an employee's claim for compensation because the employee refused to attend an independent medical examination.<sup>112</sup> The workers' compensation court dismissed the action as premature because the claim did not meet any of the four required conditions listed in § 23:1314.<sup>113</sup>

On review, the fourth circuit noted Michaels' argument that an

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109. The reason that a Form 1008 is often associated with general claims filed under section § 23:1310.3 is because that statute requires claims for compensation or claims to controvert benefits to be filed on the appropriate form. This may be why some courts have associated any claim filed using Form 1008 with those claims arising under § 23:1310.3.

110. Filing limitations are not explained in any statute or hearing rules. The presumption is that a Form 1008 is required in all cases not already before the court, because the court needs the information on a Form 1008 to create a file in its case management system.

111. See LA. ADMIN. CODE tit. 40, § 5501 (2010) for the hearing rules for the workers' compensation court. Title 40, section 5501(A) of the Louisiana Administrative Code states:

The purpose of these rules is to govern the practice and procedures before the Workers' Compensation Court which is a statewide court having jurisdiction of claims for workers' compensation benefits, the controversion of entitlement to benefits and other relief under the workers' compensation act. These rules are designed to facilitate the equitable, expeditious and simple resolution of workers' compensation disputed claims filed with the Court.

LA. ADMIN. CODE tit. 40, § 5501(A) (2010).

112. *Michaels Store, Inc. v. Hart*, 2001-0655 (La. App. 4 Cir. 05/20/02); 815 So. 2d 201. See also LA. REV. STAT. ANN. § 23:1124 (2005). This statute was enacted in 1997 and remains unchanged. Section 23:1124(A) provides the authority to terminate benefits when an employee refuses to attend a medical examination. § 23:1124(A). Section 23:1124(B) authorizes the employer to seek an expedited hearing for the purpose of enforcing (compelling) the medical examination and to suspend benefits until the employee attends the medical examination. § 23:1124(B). Because this claim is brought through an expedited hearing and a rule to show cause, it is classified as a summary proceeding statute. See LA. CODE CIV. PROC. ANN. art. 2592(3) ("Summary proceedings may be used for trial or disposition of the following matters only: [a]n issue which may be raised properly by an exception, contradictory motion, or rule to show cause.").

113. *Michaels Store*, 815 So. 2d 201; see also *supra* note 57.

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employer who pays compensation but wishes to compel a medical examination and/or suspend benefits pursuant to § 23:1124 can never meet the allegations required by § 23:1314.<sup>114</sup> Because of this conclusion, the employer argued that § 23:1314 should not apply to employers' claims.<sup>115</sup> Without considering the applicability of § 23:1314 to summary proceedings, the fourth circuit cited its earlier decision in *Labor Ready Inc. v. Lorick*, which held simply that § 23:1314 applies to Form 1008s filed by employers.<sup>116</sup> Moreover, the fourth circuit did not address whether Michaels failed simply to file the motion as a summary proceeding as required under § 23:1124, which would have resulted in the case being considered under the ordinary proceeding rules. However, this oversight by the courts seems unlikely because both the workers' compensation court and the fourth circuit would not have ignored something that could have been so easily rectified; the likely conclusion is that these courts refuse to distinguish between the application of § 23:1314 to §§ 23:1310.3 and 23:1124.

Thus, while Michaels argued that an employer who wishes to compel a medical examination and suspend benefits is inherently incapable of satisfying the pleading requirements of § 23:1314, it failed to note that § 23:1314 establishes the pleading requirements for § 23:1310.3, but not for the summary proceeding statutes, which contain their own separate pleading requirements.<sup>117</sup> The fourth circuit expanded existing precedent by allowing the application of § 23:1314 to all claims filed on a Form 1008 without any consideration of the summary proceeding statutes, thereby endorsing application of the prematurity pleading requirements—designed for use only in ordinary proceedings—to summary proceedings.<sup>118</sup>

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114. *Michaels Store, Inc. v. Hart*, 2001-0655 (La. App. 4 Cir. 05/20/02); 815 So. 2d 201.

115. *Id.* at 202.

116. *Id.* (citing *Labor Ready, Inc. v. Lorick*, 2000-1559 (La. App. 4 Cir. 9/6/00); 2000 La. App. LEXIS 3798). In *Labor Ready*, the Fourth Circuit denied an employer's writ seeking review of the trial court's granting of an employee's exception of prematurity against an employer's claim to terminate benefits. *Labor Ready*, 2000 La. App. LEXIS 3798, at \*7. The Fourth Circuit admitted the result did not fully recognize the duality of employers' and employees' ability to bring claims. *Id.* However, the court noted that employers still have a right to terminate benefits if they believe an employee is not entitled and to then file a claim. *Id.* The court opined further that the problem resulted from the state legislature's updating of some parts of the LWCA while failing to update other parts. *Id.* at \*5.

117. See *supra* note 108 for an examination of some summary proceeding statutes applicable to workers' compensation claims.

118. See generally *Bank One v. Johnson*, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30. In *Bank One*, the court held that § 23:1314 applied to a Form 1008 filed pursuant to § 23:1310.3. *Id.* at 32. However, after the decision in *Michaels Store*, the Fourth Circuit held that § 23:1314 applies to all Form 1008s, whether filed under § 23:1310.3 or any other statutes in the Workers' Compensation Act. *Michaels Store, Inc. v. Hart*, 2001-0655 (La. App. 4 Cir. 05/20/02); 815 So. 2d 201, 202.

In its final remarks, the *Michaels Store* court reiterated the fourth circuit's position that the problems created by the application of § 23:1314 to employers is a problem best addressed by the Louisiana Supreme Court or the legislature.<sup>119</sup> This holding is consistent with the position taken by other state circuits in refusing to abolish the applicability of § 23:1314 to employers.<sup>120</sup>

## 2. THE FIFTH CIRCUIT FOLLOWS THE FOURTH CIRCUIT'S FLAWED LOGIC

In *Clement v. Blanchard*, the employer Blanchard filed a petition in the workers' compensation court seeking to reduce benefits and to compel the employee Clement to undergo a medical examination.<sup>121</sup> Clement raised an exception of prematurity to Blanchard's claim.<sup>122</sup> The exception was ignored at the trial level.<sup>123</sup> Instead the workers' compensation judge found for Clement on the substantive issues raised in the petition.<sup>124</sup> On appeal, the fifth circuit noted that the prematurity issue must first be addressed before considering the substantive issues in the petition.<sup>125</sup>

The fifth circuit's opinion did not note any particular argument made by Blanchard.<sup>126</sup> The court instead focused only on the facts that were likely to meet one of the four requirements under § 23:1314, such as Clement's failure to attend a pre-surgical psychological evaluation.<sup>127</sup> The court likely focused on this fact because one of the pleading requirements in § 23:1314 relates to those medical benefits to which he was entitled.<sup>128</sup> Even though Clement failed to attend the evaluation, Blanchard continued to provide the medical benefits as required by the LWCA.<sup>129</sup> But § 23:1314 is focused on the *employer's success in meeting his duties* rather than the *employee's failure to meet his duty*.<sup>130</sup> Thus, in applying this rule, the court determined that Clement's failure to attend the pre-surgical psychological

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119. *Michaels Store, Inc. v. Hart*, 2001-0655 (La. App. 4 Cir. 05/20/02); 815 So. 2d 202.

120. See *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295, 297-98; *La. Commerce & Trade Ass'n-SIF v. Cruz*, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1044-45.

121. *Clement*, 924 So. 2d at 295-96.

122. *Id.* at 296.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295.

127. *Id.* at 296-97

128. See LA. REV. STAT. ANN. § 23:1314(A)(2) (1998).

129. *Clement*, 924 So. 2d at 296.

130. See generally LA. REV. STAT. ANN. § 23:1314 (1998).

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evaluation did not satisfy the pleading requirement set forth in § 23:1314.<sup>131</sup>

The court then examined an employer's ability to file claims in the workers' compensation court and the applicability of § 23:1314 to those claims.<sup>132</sup> In doing so, the court cited *Labor Ready Inc. v. Lorick*:

[T]he proper procedure any "claimant" must follow is legislatively provided and attempts to allow for consistency when dealing with a worker's compensation claim. Upon the filing of a petition with the office of worker's compensation administration pursuant to R.S. 23:1310.3, a claim must set forth one of the necessary allegations provided in La. R.S. 23:1314(A).<sup>133</sup>

The court noted the "anomaly . . . created by the current versions of LSA-R.S. 23:1310.3 and 23:1314 as they apply to employers," yet it chose to extend the application of that anomaly to a summary proceeding statute.<sup>134</sup>

#### **VI. THE FOURTH AND FIFTH CIRCUITS MISTAKENLY APPROVED THE APPLICATION OF LA. R.S. § 23:1314 TO SUMMARY PROCEEDING CASES**

The rule to be extracted from the fourth and fifth circuit jurisprudence is that any workers' compensation claim filed by an employer using a Form 1008 may be challenged under the prematurity exception of § 23:1314.<sup>135</sup> Such a rule layers the pleading standard of an ordinary proceeding statute, § 23:1310.3, over those of a summary proceeding statute, § 23:1124, thereby creating a disjointed and unpredictable rule of procedure.

Summary proceeding statutes were enacted to provide employers with expedited access to the workers' compensation court.<sup>136</sup> Since each of these statutes is necessarily implicated by a specified set of circumstances, the legislature saw fit to attach to each an individualized pleading requirement.

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131. *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295, 298.

132. *Id.* at 297.

133. *Id.* (citing *Labor Ready, Inc. v. Lorick*, 2000-1559 (La. App. 4 Cir. 9/6/00); 2000 La. App. LEXIS 3798, at \*5).

134. *Id.* at 298.

135. The one exception that may be found in a close reading of *Michaels Store, Inc.* and *Clement* is that § 23:1314 applies only to those claims filed on a Form 1008. See LWC-WC-1004, Request for Social Security Benefits Information: (L.R.S. 23:1225), available at <http://www.laworks.net/Downloads/OWC/1004form.pdf>; LWC-WC-1005a, Motion for Recognition of Right to Social Security Offset, available at <http://www.laworks.net/Downloads/OWC/1005a.pdf>. Both of these forms illustrate instances where the Louisiana Workers' Compensation Administration has provided forms other than LWC-WC-1008 to obtain access to the court.

136. See *supra* note 108.

Ordinary proceedings, on the other hand, are subject to the broad pleading requirements set forth in the LWCA. Filing a claim under § 23:1310.3 is governed by the procedural strictures of § 23:1314.<sup>137</sup> A failure to plead one of the four scenarios enumerated in § 23:1314 may result in the dismissal of a § 23:1310.3 claim as premature.<sup>138</sup> This language logically leads one to conclude that the prematurity exception created by § 23:1314 can be applied only to claims arising under § 23:1310.3.

While both the fourth and fifth circuits claim to honor the plain language of § 23:1314, they actually ignore it by expanding the statute's scope to govern all claims accompanied by a Form 1008, regardless of the factual circumstances underlying the claim. Under the summary proceeding statutes, the only filing requirements are a motion to compel or rule to show cause and the underlying cause of action.<sup>139</sup> The workers' compensation administrative system, however, is not designed to accept either pleading without an accompanying Form 1008. Thus, it would appear employers are left without a remedy in these circuits. A possible solution is for employers to include in the motion the necessary information typically demanded by a Form 1008.<sup>140</sup> Although it is unclear how the circuits or the workers' compensation courts would handle such a filing, such a motion would meet all of the statutory requirements set forth in the LWCA.

Should this issue go to the Louisiana Supreme Court, it will likely take issue with the fourth and fifth circuits' application of § 23:1314 pleading requirements to the summary proceeding statutes. For nearly a century, the Louisiana Supreme Court has acknowledged the "well-settled proposition that '[i]n the interpretation of . . . statutes, the specific controls the general.'"<sup>141</sup> Equally well-settled is the rule that when there is a conflict between a general statute and a specific statute, the specific statute governs.<sup>142</sup> No consideration was given to this issue by any of the

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137. See LA. REV. STAT. ANN. § 23:1314 (1998); see also *supra* note 58.

138. See LA. REV. STAT. ANN. § 23:1314 (1998); see also *supra* note 57.

139. See *supra* note 107 and accompanying text.

140. See *supra* note 52; see also *supra* note 106, which notes that litigants must call the OWC to identify which pieces of information from a Form 1008 are required for the OWC's case management system. Therefore, employers wishing to file a motion with the requisite information may not be required to supply all information requested on the form 1008, but must first call the OWC to learn exactly which information is necessary.

141. State *ex rel.* A.C., 93-1125 (La. 1/27/94); 643 So. 2d. 719, 730 (*citing* *Mixon v. St. Paul Fire & Marine Ins. Co.*, 84 So. 790, 791 (La. 1920)).

142. The Louisiana Supreme Court has stated:

The provisions of a special law . . . are not repealed by a general law . . . unless the intention to repeal such provisions of the special law are expressed in the later general law on the subject, or unless the repealing clause declares that all laws on the same subject are repealed,

aforementioned circuits, possibly because none of the employers in the cases discussed raised the conflict between specific and general statutes.

### VII. LEGISLATIVE INTENT AND JUDICIAL INTERPRETATION OF LA. R.S. § 23:1314

Although the first, fourth, and fifth circuits all recognized that applying § 23:1314 to employers created an “absurd consequence,” all failed to consider article 9 of the Louisiana Civil Code. That article permits courts to use legislative intent as a means to interpret a statute that is otherwise clear and unambiguous, but when applied leads to an absurd consequence.<sup>143</sup> If these courts had used article 9 to exercise the full scope of their authority to interpret the applicability of § 23:1314 to employers, it is possible they would have reached an altogether different outcome.

The Louisiana Supreme Court has stated that “[s]ince the intention of the legislature constitutes the law of its enactments, it is the intention rather than the literal meaning of the statute which controls; or, as is generally said, the spirit of the statute will prevail over the strict letter.”<sup>144</sup> In other words, the court will “apply the statute and [ ] interpret it in a manner which is consistent with logic and the presumed fair purpose and intention of the Legislature in passing it . . . .”<sup>145</sup>

Equally important is how courts will apply statutes that can be interpreted to have more than one meaning. The Louisiana Supreme Court has held that if a law has more than one interpretation, a court should choose that which is not inconsistent or absurd, so long as it does not

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or unless the repeal by implication is necessary to give the general law any meaning, application or effect.

State *ex rel.* Texada v. Capdeville, 72 So. 946, 953 (La. 1916); *see also* Hewitt v. Webster, 118 So. 2d 688, 690 (La. App. 2 Cir. 1960) (explaining that “though the general law may have been passed subsequent to the passage of the special law, the special law is not thereby repealed by implication and it is only affected if reference is made to it expressly.”).

143. LA. CIV. CODE ANN. art. 9 (2010). This article states that “[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” *Id.*; *see also* Pumphrey v. City of New Orleans, 2005-979 (La. 4/4/06); 925 So. 2d 1202, 1209 (acknowledging the courts’ authority to search for legislative intent when the application of a statute leads to an absurdity).

144. Curatorship of Parks, 26 So. 2d 289, 292 (La. 1946) (quoting EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES 292 (1940)).

145. *See* Rodriguez v. La. Med. Mut. Ins. Co., 92-3333 (La. 5/24/93); 618 So. 2d 390, 394 (citing Freechou v. Thomas W. Hooley, 383 So.2d 337, 340 (La. 1980)); *see also* Malone v. Cannon, 41 So. 2d 837, 843 (La. 1949) (noting that a court should endeavor “to ascertain the uniform and consistent purpose of the legislature or to discover how the policy of the legislature with reference to the subject matter has been changed or modified.”).

violate the plain language and furthers the purpose of the law.<sup>146</sup> With these principles in mind, an examination of the LWCA's legislative history clearly illustrates that § 23:1314 was intended to govern only claims filed by employees.

The prematurity exception found today in § 23:1314 can be traced to Section 18.1(B) of Louisiana Act No. 85 of 1926. This section provided:

Unless in the verified complaint above referred to it is alleged (where the complaint is filed by the employee or his dependents) that the employee or the dependent is not being or has not been paid, and that the employer has refused to pay, the maximum per centum of wages to which petitioner is entitled under the provisions of this act, the presentation of filing of such complaint shall be premature and shall be dismissed . . . .<sup>147</sup>

The prematurity exception was originally intended to apply only to claims filed by employees or dependents of employees. Section 18.1(B) remained relatively unchanged until 1983.<sup>148</sup> The 1983 amendments to the workers' compensation laws created a list of pleading requirements similar to those found in § 23:1314 today.<sup>149</sup> It was in creating this list that the legislature failed to carry over the earlier provision restricting the statute's application to claims filed by employees and their dependents. There is a presumption that the legislature's failure to include the employee-only provision was intentional.<sup>150</sup> This presumption may be overcome only by legislative intent indicating the contrary or by an alterative rule of law that would explain away the presumption.<sup>151</sup>

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146. See *City of New Orleans v. Bd. of Supervisors of Elections*, 43 So. 2d 237, 246-47 (La. 1949).

147. 1926 La. Acts 123. Section 18.1(B) is the predecessor to § 23:1314 and applies to § 18.1(A), which is the predecessor to § 23:1310.3.

148. This section was unaffected by the amendments in La. Acts No. 81, § 1 of 1930 and while the amendments in La. Acts No. 539, § 1 of 1950 changed some words the restriction which only applied prematurity to claims brought by employees remained intact.

149. See 1983 La. Acts 1849-50.

150. *New Orleans Rosenbush Claims Svc. v. City of New Orleans*, 94-2223 (La. 4/10/95); 653 So. 2d 538, 544 (citing *La. Civil Svc. League v. Forbes*, 246 So. 2d 800, 809 (1971), *overruled on other grounds*, *Barnett v. Develle*, 289 So. 2d 129 (La. 1974)) ("The legislature is presumed to have enacted a statute in light of the preceding statutes involving the same subject matter and court decisions construing those statutes, and where the new statute is worded differently from the preceding statute, the legislature is presumed to have intended to change the law.").

151. See LA. CIV. CODE ANN. art. 9 (2010); see also, *ABL Mgmt., Inc. v. Bd. of Supervisors*, 2000-0798 (La. 11/28/00); 773 So. 2d 131, 137. The *ABL Mgmt.* decision created an alternative presumption that the legislature will not use language that is meaningless or redundant. *Id.* at 135. This alternative presumption may overcome the presumption that the legislature deleted the language because they no longer wanted the employee-only presumption to apply.

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Legislative intent may sometimes be found by examining the legislative résumé,<sup>152</sup> legislative journal,<sup>153</sup> statutory history (notes),<sup>154</sup> committee minutes,<sup>155</sup> or different versions of the bill as it proceeded through the legislature.<sup>156</sup> But in this case, none of these contains a discussion of the Senate's decision not to carry over the employee-only provision from the previous version of § 23:1314.

As mentioned earlier, in the absence of a clear sign of legislative intent, a court may look to an alternative rule of law to overcome the presumption of intentional omission. One such rule is that the legislature elected not to use language that could be considered meaningless, redundant or useless.<sup>157</sup>

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152. See S.B. 14, 1st Ex. Sess., Résumé, at 1-9 (La. 1983). The résumé goes into detail regarding the extensive changes to the workers' compensation law but it does not address § 23:1314. *Id.* The résumé states the general principal of the previous law, what portion of that law was retained or replaced and both the principal and some direct language from the new law. *Id.* The fact that the résumé covers small changes in the law yet fails to mention the drastic change in removing the restriction in this statute limiting its application to employee's claims should speak to the lack of intent in the legislature's failure to carry over the employee-only provision.

153. See S. & H.R. JOURNAL, 8th Ex. Sess., Legis. Calendar (La. 1983); see also LA. CONST. art. 3, § 10(B). The Louisiana Constitution states:

Each house shall keep a journal of its proceedings and have it published immediately after the close of each session. The journal shall accurately reflect the proceedings of that house, including all record votes. A record vote is a vote by yeas and nays, with each member's vote published in the journal.

LA. CONST. art. 3, § 10(B). As such, the Louisiana legislature is not required to keep detailed congressional records. Although, this may lower the cost of record keeping it also decreases the likelihood of finding relevant information on legislative intent because the journals provide notes summarily on the happenings of each bill on a particular day. The legislative calendar is a separate means of recording events during legislative sessions. The legislative calendar indicates that while at the Senate and House no modifications were made to the bill relevant to § 23:1314 compared to how it was first presented and there were no references to this statute. S. & H.R. JOURNAL, 8th Ex. Sess., Legis. Calendar, at 473 (La. 1983).

154. See LA. REV. STAT. ANN. § 23:1314 (1985 & 1998). Reviewing the most recent annotated statutes and the annotated statutes shortly after the passing of the 1983 does not reveal any useful information as to the legislature's intent to remove the employee-only revision. The 2010 historical notes state that the 1983 amendment substituted "dismissal of premature petition" for "support for allegations" in the section heading and rewrote the previous section in its entirety. See LA. REV. STAT. ANN. § 23:1314 (1985) (historical notes).

155. See S.B. 14, 1983 Leg., 1st Ex. Sess. (La. 1983), Minutes of Meeting Before the H. Comm. on Labor and Indus. (January 13, 1983) (on file with author). The meeting minutes from the House do not provide any relevant information on the changes to § 23:1314. There are no Senate minutes related to Louisiana Senate Bill 14 of 1983.

156. Four versions of the 1983 Amendments passed through the senate. See S.B. 14, 1983 Leg., 1st Ex. Sess. (La. 1983). Each bill was the same regarding § 23:1314. *Id.* There is no sign that the bill ever contained the employee-only provision and that it was later removed.

157. See *D'Antoni v. Employers' Liability Assurance Grp.*, 34 So. 2d 378, 380 (La. 1948). In *D'Antoni*, the Louisiana Supreme Court held that the purpose of the prematurity statute was to

A close reading of § 23:1314 shows that each of the four prematurity requirements appears to acknowledge a species of claim that could only be filed by an employee.<sup>158</sup> Not one of the prematurity requirements appears to be relevant in any way to claims made by employers.<sup>159</sup> This conclusion bolsters the argument that the legislature simply sought to avoid what it thought to be redundant language.

Likewise, without any evidence that the legislature intended to overturn nearly seventy years of statutory law and jurisprudence, it is reasonable to conclude that the legislature simply chose to remove language that was considered common knowledge at the time. But even if such a conclusion were too great a leap of faith, the historical application of the prematurity exception to only employee's claims shows that the statute is susceptible to different meanings.

According to article 10 of the Louisiana Code of Civil Procedure, "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."<sup>160</sup> Section 23:1314 was enacted by the legislature to provide an opportunity to challenge workers' compensation claims where the underlying claim is not yet ripe.<sup>161</sup> The summary proceeding statutes, on the other hand, were enacted for the sole purpose of granting employers expedited access to the workers' compensation court.<sup>162</sup> In light of these twin aims, consider the words of the Louisiana Supreme Court: "Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions."<sup>163</sup> Applying § 23:1314's prematurity exception to employers

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dispose of an employee's claim to compensation when full compensation was already being received. *Id.* This paper proposes that *D'Antoni* supports the proposition that statutory language reiterating this same rule of law would be redundant. Thus, if it is presumed that the legislature does not use meaningless, redundant or useless language, it should also be presumed that the legislature did not insert language that would have been redundant to the case law in existence at the time the statute was rewritten.

158. See *supra* note 58 for an explanation of the application of each section of Louisiana Revised Statute § 23:1314(A) to claims by employers. Only an employee can file a claim meeting the requirements of § 23:1314 without admitting wrongdoing. See LA. REV. STAT. ANN. § 23:1314.

159. See generally LA. REV. STAT. ANN. § 23:1314 (1998).

160. LA. CODE CIV. PROC. ANN. art. 10 (2010).

161. See generally, LA. REV. STAT. ANN. § 23:1314 (1998). The underlying claim is not ripe for employees when the employee is receiving all to which he is entitled.

162. See, e.g., *id.* (providing for expedited proceedings by employers to compel a medical examination and terminate benefits).

163. *City of New Orleans v. Bd. of Supervisors of Elections*, 43 So. 2d 237, 246 (La. 1949).

disrupts the statutory harmony of the Louisiana workers' compensation laws. In conflating multiple pieces of narrowly tailored legislation, employers are left to suffer from significant procedural disadvantages. More importantly, though, such a measure may actually run afoul of the protections afforded employers under the Louisiana constitution.

### VIII. THE CONSTITUTIONALITY OF LA. R.S. § 23:1314 AS APPLIED TO EMPLOYERS

The Louisiana constitution protects certain fundamental rights of employers, to ensure that such rights are not burdened without due process of law.<sup>164</sup> The Louisiana constitution provides that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.”<sup>165</sup> The procedural due process rights afforded to parties in litigation effectively serve to prohibit courts from enforcing statutes which burden the right to a hearing.<sup>166</sup> Moreover, employer's rights of access to the courts are protected as well.<sup>167</sup>

The Louisiana constitution provides that “[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.”<sup>168</sup> Under the procedures elucidated in § 23:1314, employers cannot gain meaningful access to the workers' compensation court system without first suffering the

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164. See LA. CONST. art. 1, § 2 (deriving its due process protections from the U.S. CONST. amend. X, XIV). An opportunity for a hearing is one such right protected by due process, and “[d]epriving a person of a right without the opportunity to be heard offends the notions of due process guaranteed by Article 1, Section 2, of the Louisiana Constitution.” *Sizan v. Saizan*, 311 So. 2d 281, 282 (La. App. 1 Cir. 1974); see also *Godchaux Sugars, Inc. v. Chaisson*, 78 So. 2d 673 (La. 1955) (finding that an “employer is . . . insured he will not be deprived of his property except by due process of law and that the courts shall be open to him for the protection of his rights.”), *vacated on other grounds by*, *Chaisson v. Southcoast Corp.*, 350 U.S. 899 (1955); see also *Legros v. Westlake Polymers Corp.*, 97-579 (La. App. 3 Cir. 12/10/97); 704 So. 2d 876, 880 (recognizing that employers have fundamental rights but did not find a fundamental right to an employee's third party claim resulting from a work related injury).

165. LA. CONST. art. 1, § 2.

166. See generally *Med. Express Ambulance Svc., Inc. v. Evangeline Parish Police Jury*, 96-0543 (La. 11/25/96); 684 So. 2d 359. The Louisiana Supreme Court held that, “[l]aws [violating fundamental rights or equal protection rights] are subject to strict scrutiny and must be necessary to achieve a compelling state interest.” *Id.* at 365 n.10 (citing *Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633 (1948)). The fundamental rights at issue in the application of § 23:1314 to employers is the right to a hearing and the right to access the courts. See generally *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330 (La. 1980) (recognizing that when the right to a hearing is provided for by statute, it may be considered a property right).

167. LA. CONST. art. 1, § 22.

168. *Id.*

risk of financial penalties.<sup>169</sup> This procedural conundrum would seemingly disregard the Louisiana Constitution's guarantee of open access to the court system.

Section 23:1310.3 and the summary proceeding statutes of the LWCA explicitly grant to employers the statutory authority to challenge an employee's request for workers' compensation benefits.<sup>170</sup> As interpreted by numerous state circuit courts, § 23:1314 denies employers the exercise of those rights by effectively preventing their filing of a Form 1008—a necessary step to filing a claim in the workers' compensation court—without first violating the LWCA.<sup>171</sup> Pursuant to § 23:1314, if an employer fails to plead that one of the four procedural requirements has occurred, their claim “shall” be premature.<sup>172</sup> Thus, § 23:1314 functions to stunt the rights given an employer under § 23:1310.3, namely the right to file a claim for the controversion of benefits.<sup>173</sup> More specifically, it creates a situation whereby the only party capable of bringing a claim without suffering an undue burden is the party with the ability to assert one of the four procedural requirements of § 23:1314—the employee.<sup>174</sup> This problem is only further exacerbated by the courts' application of § 23:1314 to summary proceeding statutes.

While proponents of the application of § 23:1314 may argue that employers are not actually denied access to the courts because they can file Form 1008s with the OWC, the fact remains that the only way to file a Form 1008 while remaining in compliance with the statute is to violate the terms of the LWCA. In other words, an employer must first admit to wrongdoing before being given a chance to be heard in the workers' compensation court. Notably, no provision of the LWCA requires that an

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169. See LA. REV. STAT. ANN. § 23:1314 (1998). In several cases, the courts have held that employers must first terminate benefits, thereby subjecting themselves to penalties and attorney's fees, to gain access to the workers' compensation court. See *Clement v. Blanchard*, 2005-531 (La. App. 5 Cir. 2/14/06); 924 So. 2d 295, 298; *Michaels Store v. Hart*, 2001-0655 (La. App. 4 Cir. 3/20/02); 815 So. 2d 201, 204; *Bank One v. Johnson*, 2004-0508 (La. App. 4 Cir. 8/11/04); 882 So. 2d 30, 32-33; *La. Commerce & Trade Ass'n-SIF v. Cruz*, 2009-2014 (La. App. 1 Cir. 5/7/10); 38 So. 3d 1041, 1046.

170. LA. REV. STAT. ANN. § 23:1310.3 (1998).

171. See *supra* note 169.

172. LA. REV. STAT. ANN. § 23:1314 (1998). Section 23:1314 states that “[t]he presentation and filing of the petition under R.S. 23:1310.3 shall be premature unless” one of the four requirements are pleaded. *Id.*

173. The only time an employer would need to file a claim to dispute benefits is if benefits are being paid. Therefore, while the courts recognize an employer's right to file a claim to controvert benefits, they fail to recognize that their reading of § 23:1314 means that an employer can file such a claim only after ceasing the payment of benefits. It is not clear under what circumstances an employer would ever need to controvert benefits if not paying them.

174. LA. REV. STAT. ANN. § 23:1314 (2010).

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employee suffer a similar burden.<sup>175</sup>

To further illustrate the problem, it is important to consider the process behind an employer filing a claim for controversion of benefits. None of the provisions set forth in § 23:1314(A) properly protects an employer's ability to have his claim heard because each focuses solely on situations where an employee suffers a cognizable harm.<sup>176</sup>

Thus, according to § 23:1314, only an employee can file a Form 1008 without consequence.<sup>177</sup> An employer who wishes to controvert payment of benefits, but seeks to avoid financial penalties must therefore wait until the employee files a Form 1008 with the OWC. This means the employee may continue to receive benefits until exhausting the statutory period, despite not actually being entitled to such benefits. On the other hand, if an employer were to terminate benefits prior to exhaustion, all parties may suffer, as the employer becomes subject to penalties and attorneys' fees and the employee is denied benefits until a judicial determination is made.<sup>178</sup> The legislature could not have intended for this procedural malfunction to govern a party's right of access to the Louisiana workers' compensation courts.

The first circuit has stated that, "[t]o claim the protections of due process, a claimant must show the existence of some property or liberty interest which has been adversely affected by state action."<sup>179</sup> By forcing

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175. See LA. REV. STAT. ANN. § 23:1314 (2010). By pleading one of the four requirements in § 23:1314 an employer admits that they have failed to meet some obligation owed to an employee under the LWCA. See *id.*

176. Section 23:1314 (A)(1) is founded entirely on an employer's failure to make timely indemnity payments to the injured employee or his dependents. See LA. REV. STAT. ANN. § 23:1314(A)(1) (1998). Section 23:1314(A)(2) also requires an employer (or insurer) to admit that "the employee has not been furnished the proper medical attention, or the employer or insurer has not paid for medical attention furnished." LA. REV. STAT. ANN. § 23:1314(A)(2) (1998) (emphasis added). Asserting a claim under § 23:1314(A)(3) requires an employer to admit that "the employee has not been furnished copies of the reports of examination made by the employer's medical practitioners after written request therefore has been made under this Chapter." LA. REV. STAT. ANN. § 23:1314(A)(3) (1998) (emphasis added). A claim pursuant to § 23:1314(A)(4) necessitates that an employer admit to a failure to pay "penalties or attorney's fees to which the employee or his dependent is entitled." *Id.* (emphasis added).

177. See generally, LA. REV. STAT. ANN. § 23:1314 (1998).

178. See *Wilkerson v. Wal-Mart Stores*, 03-1353 (La. App. 5 Cir. 3/30/04); 871 So. 2d 510, 514 (holding that an employer and insurer could not unilaterally terminate a claimant's benefits without first having a hearing regarding that issue); see also *Guillory v. City of Crowley*, 93-1060 (La. App. 3 Cir. 8/31/94); 643 So. 2d 196, 200 (finding that an employer must first obtain a judicial determination before terminates benefits because of an employee's refusal to accept medical treatment; otherwise, the employer is subject for penalties and attorneys' fees).

179. *Acadian Ambulance Svc., Inc. v. Parish of E. Baton Rouge*, 97-2119 (La. App. 1 Cir. 11/6/1998); 722 So. 2d 317, 322. The property interest at issue here is the employer's right to a

the employer to admit to wrongdoing prior to obtaining court access, § 23:1314 strips employers of a property interest without first providing the opportunity to be heard. The potential assessment of penalties and attorneys' fees effectively serves as the price of admission for an employer to be heard in the workers' compensation court.<sup>180</sup> Surely, the Louisiana Constitution will not allow this blatant deprivation of a property right in the absence of an opportunity to plead one's case.<sup>181</sup>

## IX. A GUIDE TO CHALLENGING THE CONSTITUTIONALITY OF A WORKERS' COMPENSATION STATUTE

The unique nature of the workers' compensation court requires special consideration as to how to challenge the constitutionality of the Louisiana workers' compensation statutes. Because the worker's compensation court is a legislative creation rather than a constitutional byproduct, it possesses only limited jurisdiction.<sup>182</sup> The legislature has bestowed it with the authority to hear only claims arising under the Workers' Compensation Act.<sup>183</sup> The workers' compensation court has not, however, been given the authority to determine the constitutionality of the individual provisions of that Act.<sup>184</sup>

### A. THE OFFICE OF WORKERS' COMPENSATION

The procedure for filing claims regarding the constitutionality of a workers' compensation statute is outlined in § 23:1310.3(F). It states that "[a]ny party challenging the constitutionality of any provision of this Chapter shall specially plead such an allegation in the original petition, an exception, written motion, or answer, which shall state with particularity the grounds for such an allegation."<sup>185</sup>

Under subsection (F)(1), the petitioner must plead the specific allegation of unconstitutionality in the original petition, an exception, written motion, or answer at the workers' compensation court level.<sup>186</sup> Subsection (F)(2) then requires the petitioner to file the constitutional claim

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hearing, especially when specifically provided for under the summary proceeding statutes.

180. See LA. REV. STAT. ANN. § 23:1201 (2005) (as amended by 2010 La. Sess. Law. Serv. No. 3).

181. *Acadian Ambulance Svc., Inc. v. Parish of E. Baton Rouge*, 97-2119 (La. App. 1 Cir. 11/6/1998); 722 So. 2d 317, 322.

182. See *supra* note 32.

183. See *supra* note 33.

184. See *infra* section IX(A)-(B).

185. LA. REV. STAT. ANN. § 23:1310.3(F)(1) (1998) (subsection (G)(1) as amended by 2010 La. Sess. Law Serv. No 53).

186. *Id.*

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in the district court.<sup>187</sup>

The most interesting aspect of filing a constitutional challenge is that it would fall under § 23:1310.3. This means that if an employer is current on payment of wages and medical benefits, the filing would be subject to prematurity. Such an outcome is truly vexing, as a constitutional challenge to the prematurity statute could potentially be dismissed by the workers' compensation court as premature. Employers may attempt to rely on a strict reading of the statute, which requires only that the constitutional challenge be alleged in the petition. The statute does not specifically require the workers' compensation court to uphold or rule on that claim. Nevertheless, the employer would likely be able to proceed to the district court even if the workers' compensation court dismissed the claim as premature because the statute only requires that the allegation be pleaded.

### B. FILING WITH THE DISTRICT COURT

Section 1310.3(F)(2) provides the rule requiring those challenging the constitutionality of a Louisiana workers' compensation statute to file their claim in district court. It states:

Within thirty days of the filing of any pleading raising the issue of unconstitutionality, the party making such an allegation must file a petition in a state district court of proper jurisdiction for purposes of adjudicating the claim of unconstitutionality. Said filing shall be given priority in hearing such claim not more than ten days from being presented to the district court.<sup>188</sup>

The law requires a petitioner to file in the state district court because the district court, and not the workers' compensation court, has original, exclusive jurisdiction over state constitutional claims.<sup>189</sup>

Section 1310.3(F)(3) contains a rule to dismiss those claims that do not meet the requirements of §§ 23:1310.3(F)(1) and 23:1310.3(F)(2). Section 23:1310.3(F)(3) provides that “[f]ailure to follow the procedures set forth in this Section shall bar any claim as to the unconstitutionality of any provision of this Chapter on appeal.”<sup>190</sup> Therefore, if the petitioner fails to

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187. LA. REV. STAT. ANN. § 23:1310.3(F)(2) (1998) (subsection (G)(2) as amended by 2010 La. Sess. Law Serv. No 53).

188. *Id.*

189. *See* *Albe v. La. Workers' Compensation Corp.*, 97-0014 (La. 10/21/97); 700 So. 2d 824, 829 (holding that the workers' compensation judge did not have original jurisdiction of claims challenging the constitutionality of a workers' compensation statute). The Louisiana Supreme Court instead recognized that the Louisiana Constitution divested the Louisiana district courts of this authority. *See id.*

190. LA. REV. STAT. ANN. § 23:1310.3(F)(3) (1998) (subsection (G)(3) as amended by 2010

plead the constitutionality argument in the workers' compensation court and subsequently files the claim with the state district court, the claim will be dismissed.

### C. FILE WITH THE ATTORNEY GENERAL'S OFFICE

The last requirement to challenge the constitutionality of a workers' compensation statute is to file a notice with the attorney general's office. This requirement is not found in La. R.S. § 23:1310.3(F). Instead, it is found in § 49:257(B), which provides:

When the constitutionality of a statute, ordinance or franchise is assailed in a declaratory judgment action the attorney general must be served with a copy of the proceeding and he is entitled to be heard and/or, at his discretion, to represent or supervise the representation of the interests of the state in the proceeding. In all other proceedings in which the constitutionality of a statute, ordinance or franchise is assailed, the attorney general *should* be served notice and/or a copy of the pleading and, at his discretion, be allowed to be heard and to represent or supervise the representation of the interests of the state in the proceeding.<sup>191</sup>

Thus, if the attorney general's office is not served with a copy of the complaint, the final requirement to allege unconstitutionality of a workers' compensation statute will not be met.

### X. CONCLUSION

Although, the law could be fixed with a simple change by the legislature,<sup>192</sup> courts and employers are left to deal with the statute as written until that time. Unfortunately, the nature of workers' compensation law is such that this type of claim will likely not make it to the Louisiana Supreme Court. Employers who violate their duty to provide indemnity and medical benefits face a \$2000 fine per offense with a maximum fine of \$8000. Furthermore, for a termination of benefits violation the attorney fees would likely not exceed a few thousand dollars. This would not begin to compare to the cost of appealing this type of case through the court of appeals and the Louisiana Supreme Court. Employers are better off paying

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La. Sess. Law Serv. No 53).

191. Vallo v. Gayle Oil Co., 94-1248 (La. 11/30/94); 646 So. 2d 859, 864 (citing LA. REV. STAT. ANN. § 49:257(B) (2006 & Supp. 2010); LA. REV. STAT. ANN. § 13:4448 (1985); LA. CODE CIV. PROC. ANN. art. 1880 (1993)).

192. The Workers' Compensation Advisory Council, which was created through § 23:1294, has authority to recommend changes to the Workers' Compensation Act. See LA. REV. STAT. ANN. § 23:1294 (1998).

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the penalties and attorney fees than litigating this type of case to its rightful conclusion.

At present, many plaintiff attorneys are either unaware of the prematurity exception, or have simply failed to take advantage of it. Consequently, as this issue comes to light, the workers' compensation court may see an influx of prematurity exceptions raised by employees, especially in the fourth and fifth circuits. This dilemma may ultimately push employers to demand that either the Louisiana Supreme Court or the state legislature remedy the current inequities produced by the prematurity exception. Until then, the exception stands as a formidable roadblock to an employer's fair and equal access to the workers' compensation court.

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